

MICHAEL P. GOLDEN
Claimant

**TONY STRUNK CONSTRUCTION CO. and
WESLEY HARING ROOFING**
Respondents

KANSAS WORKERS COMPENSATION FUND

ORDER

ISSUES

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Wesley Haring Roofing was a sole proprietorship owned and operated by Wesley Haring. Claimant's job with Wesley Haring Roofing was as a roofer and shingler. Claimant was paid by the square. Mr. Haring also paid for claimant's health insurance. When he was working for Mr. Haring in 1996, sometimes he would have withholdings taken out of his check. Mr. Haring admitted that he would sometimes withhold social security and federal income tax from worker's checks, including claimant's, but he does not know for sure whether those withholdings were paid into the tax people or not. Mr. Haring rarely paid him with a check,

usually with cash. Claimant denies he asked Mr. Haring to pay him with cash rather than by check. Claimant did not receive either a W-2 or a 1099 from Wesley Haring Roofing. Claimant did not file income tax returns for the years 1991 to 1995 so there is no evidence as to how claimant treated his income for tax purposes. Most of the pay he received for roofing work during those years was in the form of cash.

Claimant testified he only used his personal truck to get to and from job sites. Claimant denies that Mr. Haring paid him a rental fee for the use of claimant's truck on the jobs. Claimant provided his own hand tools including a hatchet, a nail bag, and a knife. Wesley Haring provided ladders, tear-off forks, nails, and all other materials including shingles.

Roofing work is seasonal. Claimant worked for Wesley Haring in the spring of 1995 and worked into November of 1995. He then started working again in late February or early of March 1996. During this entire time he had health insurance benefits from Mr. Haring, even when he was not actually working. Claimant was not sure when the health insurance coverage started; he thought it was either 1995 or 1996. Claimant submitted his medical bills for this injury to the health insurance carrier.

Claimant did not work every job Wesley Haring Roofing had. During 1996, claimant had worked on two or three jobs for Wesley Haring Roofing. Claimant worked about ten jobs for Wesley Haring Roofing during 1995. As to his usual working relationship with Wesley Haring, claimant testified:

Q. When you were available and when he called you, you came out to work the particular roof at a particular site, correct?

A. Pretty much.

Q. You came out when you wanted to and worked as long as you wanted to, correct?

A. No, I came out when he wanted me to, when there was a job to be done, and he needed my help, he called me and asked me to help.

Q. And when you came out, you worked as long as you wanted to, didn't you?

A. I worked as long as he worked.

Q. Did he tell you when to go home?

A. No, I just left when he left.

Q. Okay. He just told you the address to show up to, correct?

A. Pretty much. (Preliminary Hearing at 32-33)

Claimant started working for Wesley Haring in 1991. He also worked for other roofers including O'Dell & Son General Contractors. Claimant had a prior workers compensation claim in 1994 against O'Dell. Claimant signed a subcontractor agreement with O'Dell but he never signed anything like that with Wesley Haring.

Wesley Haring testified that he was the owner and sole proprietor of Wesley Haring Roofing. In 1995 the name of his company was Haring Roofing & Siding and Home Improvements. It was a corporation. He declared bankruptcy in 1995 both personally and in the name of the corporation. He has since been doing business as Wesley Haring Roofing. He acknowledged that he has been providing claimant with group health insurance coverage even during periods when claimant has not been working for him, but indicated this was to maintain the group coverage on himself and his wife.

According to Mr. Haring, he paid claimant with checks in part as rental payment for the use of claimant's truck. However, he agreed he did not have an understanding with claimant concerning that arrangement. Mr. Haring testified that he had between 20 and 50 jobs in 1996 and claimant only worked something like two jobs for him in 1996. On some of the jobs which claimant did not work, Mr. Haring had other people helping him and on others he did all the work himself.

The primary test used to determine whether an employment relationship exists so as to bring an accident within the scope of the Workers Compensation Act is:

"Whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is . . . performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor." *Danes v. St. David's Episcopal Church*, 242 Kan. 822, 831, 752 P.2d 653 (1988) (quoting *Wallis v. Secretary of Kans. Dept. Of Human Resources*, 236 Kan. 97, 102-03, 689 P.2d 787 [1984]).

"In general, it may be said than an independent contractor is one who, in their exercise of an independent employment, contracts to do a piece of work according to his own methods and who is subject to his employer's control only as to the end product or final result of his work. [Citation omitted.] On the other hand, an employer's right to direct and control the method and manner of doing the work is the most significant aspect of the employer-employee relationship, although it is not the only factor entitled to consideration. An employer's right to discharge the workman, payment by the hour rather than by the job, and the furnishing of equipment by the employer are also indicia of master-servant relation." *Danes*, at 831-32 (quoting *McCarty v. Great Bend Board of Education*, 195 Kan. 310, 311-12, 403 P.2d 956 [1965]).

Here, there was substantial evidence which could support finding claimant to be either an employee or an independent contractor. Mr. Haring testified he exercised little direct control over claimant's manner or method of work, whereas claimant's testimony was to the

contrary. Claimant denied that he was free to come and go and to do the work as he pleased. There was evidence that Mr. Haring controlled which jobs were to be done and when and how long claimant would work. Although this evidence alone does not establish control over the manner and method of work, it does show that Mr. Haring, at a minimum, defined the job that was to be done and that he could reject the finished product.

Furthermore, although the evidence that claimant was paid by the square rather than by the hour or by salary tends to show he was an independent contractor rather than an employee, both claimant and Mr. Haring testified that paying by the square was customary in the roofing industry regardless of the employment relationship. Similarly, it is common for roofers to have their own hand tools. Although the providing of equipment by claimant tends to show an independent contractor relationship, respondent also supplied some of the tools and equipment, and respondent apparently supplied all of the materials.

Therefore, although there is some evidence which could support a finding that claimant was an independent contractor, the greater weight of the evidence supports a finding of an employee/employer relationship between claimant and Wesley Haring Roofing.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order by Administrative Law Judge Nelsonna Potts Barnes dated February 28, 1997, finding claimant to be an employee of Wesley Haring Roofing should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 1997.

BOARD MEMBER

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